APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

ALTON L. TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A05-0511-PC-639
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable James A. McEntarfer, Judge
Cause No. 62C01-0108-PC-308

August 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Alton Taylor appeals the denial of his petition for post-conviction relief. We affirm in part, vacate in part, and remand.

Issues

Taylor presents a variety of issues, which we reorganize and restate as follows:

I. Whether his sentence constituted vindictive sentencing, cruel and unusual punishment, disproportionate sentencing, and/or double jeopardy; and

II. Whether he received effective assistance of trial and appellate counsel.

Facts and Procedural History

In an opinion issued twenty years ago, our supreme court set out the relevant facts in Taylor's case:

> On May 10, 1981, Marcia Sanders was driving from St. Louis, Missouri en route to St. Mary's, Kentucky. Along the way she picked up a hitchhiker. After driving for approximately two and one half hours, the hitchhiker put a knife to Sanders's side and forced her to exit Interstate 64 near St. Croix, Indiana. While verbally threatening her and still holding the knife at her side, he directed her to an abandoned barn. He then forced her into the barn, attempted anal intercourse, and raped her. Following the rape he beat her severely with a board, left her for dead and drove away in her car. Sanders managed to make her way to the road after regaining consciousness and was found by a passing motorist. On November 14, 1981, Sanders's car was located in Tell City, Indiana in [Taylor's] possession. He was arrested on a charge of possession of stolen property as well as on other unrelated charges. Sanders positively identified [Taylor] at a line-up and at trial as the hitchhiker who attacked her.

Taylor v. State, 515 N.E.2d 1095, 1096 (Ind. 1987).

On November 18, 1981, the State charged Taylor with rape, criminal confinement, attempted criminal deviate conduct, robbery, attempted murder, battery, and theft. Exhs.

Vol. 1 at 15-23. In December 1981, the battery and theft charges were dismissed, and the State amended the attempted murder and the robbery charges. *Id*. In the spring of 1982, Taylor pled guilty to the remaining five charges and received a 220-year prison sentence. *Id*. at 88-90.

On March 12, 1985, Taylor filed a petition for post-conviction relief, alleging that his guilty pleas were "unknowing, unintelligent and hence also involuntary." *Id*. at 113, 103-27. In August 1985, the court granted Taylor's petition for post-conviction relief and appointed attorney Gerald Thom to represent him. Thom filed a speedy trial motion on August 14, 1985. Taylor's jury trial began on October 8, 1985, and ended three days later when the jury found him guilty on all counts. The following month, the court ordered enhanced and consecutive sentences totaling 220 years.

In January 1986, Taylor filed a motion to correct error, which was denied by the trial court. Thereafter, Taylor, still represented by Thom, filed a direct appeal, raising five issues:

> (1) whether the State's delay in providing the criminal history of one of its witnesses entitled appellant to a continuance; (2) whether the trial court erred by failing to grant appellant a continuance to subpoena radio transcripts and in denying appellant's motion for change of venue due to prejudicial pre-trial publicity; (3) whether the trial court erred by permitting the State to introduce into evidence photographs of a line-up which included the court's bailiff; (4) whether the trial court erred by failing to grant appellant a mistrial or a continuance when the State's chief witness testified she had been hypnotized; and (5) whether the trial court erred in its sentencing determination.

Taylor, 551 N.E.2d at 1096. In its opinion issued December 3, 1987, our supreme court affirmed the trial court. *Id*. at 1099.

On August 2, 2001, Taylor filed a petition for post-conviction relief, this time alleging: (a) ineffective assistance of trial counsel "resulting in violations of the Fifth, Sixth,

Eighth and Fourteenth Amendments" and violations of Article I, Sections 12, 14, 16, and 18 of the Indiana Constitution; and (b) "Trial Court error. Prosecutrix's hypnotically enhanced identification was unduly suggestive and improperly admitted into evidence inasmuch as no identification of [Taylor] occurred prior to the hypnosis." Appellant's App. at 147-48. Later that same month, the State filed its response, denying certain allegations, asserting insufficient information regarding other allegations, and raising laches, waiver, and prior adjudication. *Id.* at 144-45. On April 18, 2002, the State filed a motion for summary judgment, which the court granted in part in August 2002. *Id.* at 122-29, 90-116.

On February 11, 2003, Taylor filed an amended verified petition for post-conviction relief, which added sentencing issues within the claims of ineffective assistance and trial court error. *Id*. at 75-84. On October 24, 2003, the court held a brief hearing regarding the amended post-conviction petition. PCR Hearing Tr. at 1-16. On September 8, 2005, the court issued findings of fact, conclusions of law, and judgment denying Taylor's petition. App. at 24-30. After various extensions and amendments, Taylor now appeals the denial of his petition for post-conviction relief.

Discussion and Decision

Standards of Review

At the outset, we note that pro se litigants, such as Taylor, "are held to the same standard as trained counsel and are required to follow procedural rules." *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. "This has consistently been the standard applied to pro se litigants, and the courts of this State have never held that a trial court is required to guide pro se litigants through the judicial system." *Id*.

A defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing a post-conviction petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Post-conviction procedures do not offer an opportunity for a super-appeal, but instead create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.* "[P]ost-conviction proceedings provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available to the defendant on direct appeal." *Conner v. State*, 711 N.E.2d 1238, 1244-45 (Ind. 1999).

As a general rule, when an issue is decided on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. *Lowery v. State*, 640 N.E.2d 1031, 1037 (Ind. 1994). Issues that were available, but not presented, on direct appeal are forfeited on post-conviction review. *Id*. Post-conviction proceedings are civil proceedings, thus a defendant must establish his claims by a preponderance of the evidence. *Stevens*, 770 N.E.2d at 745. Therefore, Taylor, appealing from a negative judgment, must show that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *See Reynolds v. State*, 783 N.E.2d 357, 358-59 (Ind. Ct. App. 2003). In other words, Taylor must convince us that there is no way within the law that the court below could have reached the decision it did. *Stevens*, 770 N.E.2d at 745-46. Although we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. *Id*. at 746.

I. Sentencing Issues

Taylor raises a variety of sentencing issues: whether his sentence constituted

vindictive sentencing, cruel and unusual punishment, disproportionate sentencing, and/or double jeopardy. "The propriety of a defendant's sentence, however, is not properly questioned through collateral proceedings." *Reed v. State*, 866 N.E.2d 767, 768 (Ind. 2007) (citing *Collins v. State*, 817 N.E.2d 230, 232-33 (Ind. 2004), and *Allen v. State*, 749 N.E.2d 1158, 1163 (Ind. 2001)). We reiterate that only issues not known at the time of the original trial or issues not available on direct appeal may be properly raised through post-conviction proceedings. *Reed*, 866 N.E.2d at 768 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)); *see also Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002) ("In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.").

On direct appeal, Taylor challenged his sentence, asserting that the trial court did not consider all the criteria listed in the former sentencing statute. Our supreme court found otherwise. To the extent that any of Taylor's current sentencing claims mirror the one rejected on direct appeal, they are barred by the doctrine of res judicata. As for those freestanding sentencing claims he raises for the first time on post-conviction, they are procedurally defaulted or waived for not having been presented in a timely manner. *See Wallace v. State*, 820 N.E.2d 1261, 1264 (Ind. 2005); *see also Wrinkles v. State*, 749 N.E.2d 1179 (Ind. 2001) (noting certain issues would only be addressed in the context of ineffective assistance of counsel). In response to Taylor's attempted invocation of the fundamental error doctrine in his reply brief, we emphasize that the fundamental error doctrine's "availability as an exception to the waiver rule in post-conviction proceedings is generally limited to"

ineffective assistance and/or issues demonstrably unavailable at trial and direct appeal. *Canaan v. State*, 683 N.E.2d 227, 235 n.6 (Ind. 1997). As such, it is of no avail here.

II. Effective Assistance of Counsel

Taylor challenges the effectiveness of Thom, who acted as both his trial and appellate counsel.

A. Trial Counsel

Taylor asserts numerous failures on his counsel's part. He contends that trial counsel Thom failed to properly investigate, conduct pretrial discovery, and prepare the case; failed to interview, depose, subpoena, or use available witnesses; failed to compel a witness's prior record;[1] failed to timely file his motion for change of venue based upon suggestive pretrial publicity; and generally failed to advocate on Taylor's behalf. *See* Appellant's Br. at 32.[2]

When reviewing ineffective assistance of counsel claims, we

> use the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong, the petitioner must establish that counsel's performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Under the second prong, the petitioner must demonstrate prejudice; that is, petitioner must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors.

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[1] To the extent that Taylor again raises this issue regarding State's witness,Anthony Wallace, our supreme court has concluded otherwise. *See Taylor*, 515 N.E.2d at 1097 ("At trial, counsel for [Taylor] thoroughly explored Wallace's criminal history and motives for testifying. There is no basis in the record or in this situation from which one could reasonably deduce that additional time for investigation and consultation would have better equipped defense counsel to conduct" cross-examination).

[2] He also faults Thom for not raising double jeopardy and other sentencing issues at trial. We will address these issues in the Appellate Counsel section *infra*.

> If our confidence that the result would have been the same is undermined, we will find that a reasonable probability exists. If we can reject an ineffective assistance of counsel claim based on lack of prejudice, we need not address whether counsel provided deficient performance.

Terry v. State, 857 N.E.2d 396, 402-03 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*; *see also Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

Indiana caselaw provides that effective representation requires adequate pretrial investigation and preparation. *See Hernandez v. State*, 638 N.E.2d 460, 461 (Ind. Ct. App. 1994), *trans. denied*. However, it is also well established that this Court should resist judging an attorney's performance with the benefit of hindsight. *Id.* at 462. "Counsel's failure to interview or depose State's witnesses does not, standing alone, show deficient performance." *Williams v. State*, 771 N.E.2d 70, 74 (Ind. 2002). The question is what additional information may have been gained from further investigation and how the absence of such information prejudiced the case. *See Williams v. State*, 724 N.E.2d 1070, 1076 (Ind. 2000).

On May 15, 2003, Thom was deposed regarding his representation of Taylor. App. Vol. 8 at 1052-1102. Contrary to Taylor's assertions, Thom did not feel that his representation was hindered by the forty-mile distance between his office and where Taylor was being held. *Id*. at 1056-57. Indeed, Thom believed that he had "sufficient enough contact" with Taylor to properly prepare the case. *Id*. at 1058-64. Clearly, Thom discussed the case with Taylor and agreed upon a strategy. Thom spoke with Sanders and reviewed her deposition. Thom utilized various motions; for example, he moved for a speedy trial, discovery, a continuance (to learn a new witness's background), a change of venue (due to

negative publicity), and mistrial (when evidence was introduced that Sanders had been hypnotized). *Id*. Not all of the motions were successful. Yet, when asked what more he could have done to support one of his motions, Thom replied that he could not think of anything else. *Id.* at 1067-68. According to billing records, Thom invested more than one hundred hours in Taylor's case – hardly "an abandonment." Exh. 6; Appellant's Br. at 32; *see Douglas v. State*, 663 N.E.2d 1153, 1155 (Ind. 1996) (setting out actions trial counsel engaged in and concluding that trial counsel did not abandon defendant).

Taylor makes much of the number of times during deposition that Thom testified he did not remember something. This inability to recall every detail of his research, investigation, and preparation does not indicate that Thom rendered ineffective assistance; rather, it is a byproduct of the passage of eighteen years since Thom represented Taylor. App. Vol. 8 at 1070-71. Taylor has not enlightened us with what additional information may have been gained from further investigation, nor has he demonstrated how the absence of such information impaired his case. Similarly, Taylor has not favored us with evidence as to who the witnesses were that he now claims should have been called to testify – let alone what their testimony might have been or how it could have been useful. *See Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998) ("A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess although a failure to call a useful witness can constitute deficient performance."). In sum, Taylor has not demonstrated the combination of deficient performance and prejudice necessary to show ineffective assistance of trial counsel.

B. Appellate Counsel

Taylor argues that Thom was ineffective on appeal for not asserting that his sentence constituted vindictive sentencing, cruel and unusual punishment, disproportionate sentencing, and/or double jeopardy.

"The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel's actions deny the defendant his right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. *Grinstead v. State*, 845 N.E.2d 1027, 1037 (Ind. 2006); *Bieghler v. State*, 690 N.E.2d 188, 192-95 (Ind. 1997) (noting that Indiana courts apply the two-prong *Strickland* test to appellate counsel's performance as well).

We are unmoved by Taylor's argument that Thom performed deficiently by not raising a vindictive sentencing issue. Article I, Section 18 of the Indiana Constitution, entitled, "Penal code founded on reformation," provides: "The penal code shall be founded on the principles of reformation, and not of vindictive justice." "[O]ur precedents have held that art. 1, § 18, applies only to the penal code as a whole, not to individual sentences." *Henson v. State*, 707 N.E.2d 792, 796 (Ind. 1999); *Scruggs v. State*, 737 N.E.2d 385, 387 n.3 (Ind. 2000). Thus, arguing that Taylor's individual sentence was vindictive would have been

fruitless. Failing to raise what would have been a meritless claim is not deficient performance. *See Vaughn v. State*, 559 N.E.2d 610, 615 (Ind. 1990).

To the extent that Taylor argues that his counsel was ineffective for not raising a cruel and unusual punishment argument,[3] we are likewise unpersuaded. "Generally, the constitutional prohibitions against cruel and unusual punishments … are proscriptive of atrocious or obsolete punishments and are aimed at the kind and form of the punishment, rather than the duration and amount." *Ratliff v. State*, 693 N.E.2d 530, 542 (Ind. 1998) (addressing federal and state constitutional prohibitions against cruel and unusual punishment); *Dunlop v. State*, 724 N.E.2d 592, 597 (Ind. 2000) (noting that life imprisonment without parole does not constitute cruel and unusual punishment). Punishment is cruel and unusual under Article I, Section 16 if it makes no measurable contribution to acceptable goals of punishment, but rather constitutes only purposeless and needless imposition of pain and suffering. *Ellis v. State*, 736 N.E.2d 731, 735 (Ind. 2000). A term of years, albeit a lengthy one, does not fall into the category of "atrocious or obsolete" or "purposeless and needless imposition of pain and suffering." Therefore, claiming that Taylor's sentence was cruel and unusual would not have been a winning argument. *See also Abercrombie v. State*, 417 N.E.2d 316, 318 (Ind. 1981) ("This Court has continually held that the constitutional prohibitions against cruel and unusual punishment are a limitation upon the acts of the General Assembly and not upon the discretion of a trial court acting within the framework of a statute imposing penalties for the offense."). Again, failing to present a

meritless claim does not constitute ineffective assistance of counsel.

Taylor's disproportionate sentence argument is equally unavailing. Article 1, Section 16 of the Indiana Constitution provides that all penalties "shall be proportioned to the nature of the offense." This does not mean we are at liberty to set aside a legislatively sanctioned penalty merely because it seems too severe. *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997). Moreover, "[t]he constitutional requirement that a sentence be proportionate to the offense does not require us to compare [Taylor's] sentence to the sentence of others convicted of the same crime." *Farris v. State*, 753 N.E.2d 641, 648 (Ind. 2001) (citing *Gambill v. State*, 675 N.E.2d 668, 678 (Ind. 1996)). Rather, a criminal penalty violates the proportionality clause "'only when a criminal penalty is not graduated and proportioned to the nature of the offense.'" *Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993) (quoting *Hollars v. State*, 259 Ind. 229, 236, 286 N.E.2d 166, 170 (1972)). Stated more precisely, a sentence violates the proportionality clause where it is so severe and entirely out of proportion to the gravity of offense committed as "'to shock public sentiment and violate the judgment of a reasonable people.'" *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996) (quoting *Cox v. State*, 203 Ind. 544, 549, 181 N.E. 469, 472 (1932)). In performing the proportionality analysis under the Indiana Constitution, we consider both the nature and gravity of the present offense as well as the nature of the prior offenses. *See Moore v. State*, 515 N.E.2d 1099, 1105 (Ind. 1987).

At the November 7, 1985 sentencing hearing, the court gave a lengthy explanation of

[3] Taylor includes this allegation in his headings and once in his discussion section, but does not develop the argument.

its sentencing decision:

> I don't know whether you understand this or not, but it's not enjoyable or fun for a court to ever take a man's freedom away even if you think it's the only possible remedy and the only proper procedure and the only proper thing for society. It just doesn't feel good to hurt somebody else. However, the reason that your sentence is going to be as it is, I can find nothing to indicate to this court that you yourself have any of those normal feeling for your fellow man. I cannot find, as Marcia Sanders says, any vestiges of humanity. I can find no normal feeling of human compassion for your fellow man. You committed, apparently, a similar offense in Ohio. You learned nothing from that. You've committed very serious offenses against a human being in this State, totally unprovoked. In fact, the lady had done you a favor and your thanks was rape, confinement, attempted deviate conduct, robbery and attempted murder. The only reason it was attempted murder is you made a mistake. You thought she was dead and she wasn't. Total lack of any kind o[f] feeling or compassion about a fellow human being, none whatsoever. Just zero, like it was not even a human being that existed. With that I have a tremendous amount of difficulty. Then to prove that you hadn't changed your feelings at all, you bragged to a fellow inmate about your offense. You have shown absolutely zero remorse or zero sorrow about this matter completely. That makes it very difficult for the Court to find any kind of mitigation. The one Mr. Thom spoke to, that you are likely to respond to short-term imprisonment. You were sentenced previously on the 22nd day of April, 1982. You've been incarcerated 3 ½ years and as early, as recent as about a month ago, you bragged about your offense. That does not show any, any whatsoever, response to imprisonment. I don't think you'll ever be changed. I don't think you're ever going to be reformed by imprisonment and that's the problem that I find. If I felt that you were going to be, I would certainly want you to be out as soon as possible, but you have shown absolutely nothing upon which a court can base any likelihood that you would respond to short-term imprisonment. Certainly, reduced sentence would depreciate the seriousness of the offense, but even not considering that, if you haven't learned in 3 ½ years, there's a lot of evidence that indicates if you don't learn in six months in prison, you don't learn forever. You never change. You either change early or you don't change. I can [see] nothing to show that you've changed at all. There are numerous aggravating circumstances in this case. Obviously, you're guilty of multiple offenses, all five of them being very serious offenses. The offenses involved very serious bodily injury. Except for fate and luck, it would've been death. You certainly made, it wasn't a heat of passion. You certainly planned this thing by forcing the victim to leave the highway, go to a very remote secluded area where you couldn't be found while you committed the offenses. You're guilty of a violent crime against a person in Ohio. You

were on probation at the time these offenses were committed, which is a violation of your probation in Ohio. Whether the circumstances are likely to recur or not, I think that's speculation, but it's certainly strongly indicated that they would by your lack of remorse. When you consider what offenses you were picked up for in this County when you were originally arrested in this County, you remember what offenses you had committed then, that doesn't show any rehabilitation. It shows just exactly the opposite. … So, I don't think this court has any alternative, even if you hadn't committed these offenses while on parole to giving you the maximum sentence on each count to be served consecutively. I can't find any excuse that I could give to the public or anyone else as to why I would do anything different. Nothing has been presented whatsoever. You haven't presented anything and nobody else has. The State has presented very strong evidence as to why it should be the maximum. Accordingly, you'll be committed to the custody of the Department of Corrections.

Exhs. Vol. IV at 726-30.

The actual sentencing order noted that the pre-sentence report had been considered and then set out the following aggravating circumstances and terms:

(1) [Taylor] is guilty of multiple offenses;
(2) The offenses involved serious bodily injury;
(3) [Taylor] used extraordinary care in planning the offenses, except the offense of Robbery, by seeking out a remote abandoned building;
(4) [Taylor] has a prior felony conviction for a violent crime against the person in the State of Ohio;
(5) [Taylor] was on probation for the Ohio conviction when he committed the instant offenses;
(6) [Taylor] is not likely to respond to short-term imprisonment since [Taylor] has already been imprisoned for these crimes for a period of 3 ½ years, but recently bragged of his conduct relating to these offenses and has shown no remorse for the crimes committed; and
(7) A reduced sentence would depreciate the seriousness of the offenses.

And now the Court having heard statements of counsel and [Taylor] sentences [Taylor] as follows:

[Taylor] shall be committed to the custody of the Indiana Department of Corrections for confinement in a secure facility for a period of 50 years for the offense of Rape, a Class A felony; 20 years for the offense of Confinement, a Class B felony; 50 years for the offense of Attempted Deviate Conduct, a

> Class A felony; 50 years for the offense of Robbery, a Class A felony; and 50 years for the offense of Attempted Murder, a Class A felony. All of the terms are to be served consecutively for a total period of confinement of 220 years.

Exhs. Vol. III at 309-10.

As the excerpt and sentencing order reveal, the court did not make a knee-jerk, emotional decision when it sentenced Taylor. To the contrary, the court weighed numerous valid[4] considerations, including the nature and gravity of Taylor's current and prior offenses. Taylor did not present any significant mitigating factors.[5] Even discounting the seventh aggravating circumstance,[6] we cannot say that Taylor's sentence was so severe and entirely out of proportion to the gravity of offenses committed as to shock public sentiment and violate the judgment of a reasonable people. *See Pritscher*, 675 N.E.2d at 731. Accordingly, Taylor's counsel's decision not to make a disproportionate sentence argument was not deficient performance.

Finally, we address the double jeopardy contentions, which seem to be based on federal and state constitutional grounds as well as common law. Taylor asserts that in

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[4] Taylor quotes our supreme court for the proposition that he should have been sentenced under Indiana Code Section 35-4.1-4-7. *See* Appellant's Br. at 23; *Taylor*, 515 N.E.2d at 1099. This is somewhat misleading. Our supreme court explained that while "the proper sentencing criteria were those in effect at the time of the crime, the statute utilized by the trial court was in effect simply a recodification of the previous statute." *Taylor*, 515 N.E.2d at 1099. Moreover, our supreme court stated, "[t]here is no indication that the [trial] judge did not consider all the criteria listed in the former statute," and consequently found no error in Taylor's sentence. *Id*.

[5] On appeal, Taylor insinuates that the court ignored the positive strides he claims to have made while in prison the first three and one-half years, i.e., his work record, involvement in church, and good conduct. Appellant's Br. at 25. However, the court was free to weigh these assertions against Taylor's more recent bragging about the crime, find that no true change had occurred, and conclude that no significant mitigating circumstance was shown.

proving he struck Sanders in the head with a deadly weapon, a wooden board, the State established both the statutory element for robbery enhancement (serious bodily injury), and attempted murder (a substantial step toward commission of the crime of murder), both class A felonies. Appellant's Br. at 18-19. Citing *Kingery v. State*, 659 N.E.2d 490, 495-96 (Ind. 1995), Taylor maintains that the robbery enhancement or conviction must be vacated. In addition, Taylor contends that his attempted deviate conduct conviction must be vacated. He reasons that because the facts of his case could support just one crime: attempted (vaginal) penetration that eventually resulted in penetration of the vagina (rape), and because the 1981 statutory elements of rape and attempted criminal deviate conduct are the same, Taylor's conviction for attempted criminal deviate conduct is the same or a lesser-included offense of rape for double jeopardy purposes. Also, Taylor argues that his convictions for rape, attempted criminal deviate conduct, and confinement subjected him to double jeopardy "as there was a reasonable possibility the jury based its guilty verdicts for the three counts on the same offense by Taylor, 'while armed with a deadly weapon,'" i.e., a knife. Appellant's Br. at 20-21. Moreover, he challenges the force element of his confinement conviction, claiming that the force was coextensive with that necessary to effectuate his other crimes. In discussing these issues, Taylor characterizes his crimes as a single episode of violence.

Prohibitions against double jeopardy protect against, *inter alia*, multiple punishments for the same offense in a single trial. *Richardson v. State*, 717 N.E.2d 32, 37 n.3 (Ind. 1999).

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[6] Caselaw since the time of Taylor's sentencing has clarified that where there was no indication the trial court was considering a reduced sentence, the depreciate the seriousness factor could not be used to justify a sentence beyond the presumptive. *See Meadows v. State*, 785 N.E.2d 1112, 1127 (Ind. Ct. App. 2003), *trans. denied*.

In the context of multiple punishments imposed in a single criminal proceeding, the U.S. Supreme Court has declared that the sole purpose of the federal Double Jeopardy Clause is to ensure that a court imposes no more punishment on a defendant than the *legislature* intended. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). When legislative intent to impose multiple punishments is uncertain, the *Blockburger*, or "same elements" tests is employed. *See Richardson*, 717 N.E.2d at 48 n.34 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The *Blockburger* test asks whether each statutory provision requires proof of an additional fact that the other does not. *Games v. State*, 684 N.E.2d 466, 477 (Ind. 1997). Generally, the *Blockburger* test does not look to the charging information, the jury instructions outlining the elements of the crime, or the underlying proof needed to establish the elements. *Id.* However, in a "narrow class of cases it is necessary to take certain core facts into account." *Burk v. State*, 716 N.E.2d 39, 44 (Ind. Ct. App. 1999) (citing *e.g.*, *Goudy v. State*, 689 N.E.2d 686 (Ind. 1997) (attempted carjacking is lesser-included offense of attempted robbery where property involved is same motor vehicle)).

We outline the elements and core facts of the crimes committed by Taylor:

> Count I, Rape, class A felony: A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force, and while armed with a deadly weapon (knife). *See* Exhs. Vol. I at 15; Ind. Code § 35-42-4-1(a)(2) repl.
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> Count II, Criminal Confinement, class B felony: A person who knowingly or intentionally removes another person, by fraud, enticement, force, or threat of force, from one place (driving on interstate) to another (secluded barn), and while armed with a deadly weapon (knife). *See* Exhs. Vol. I at 16; Ind. Code § 35-42-3-3 repl.
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> Count III, Attempted Criminal Deviate Conduct, class A felony: A person who knowingly or intentionally engages in conduct that constitutes a substantial step toward commission of causing penetration of the anus of

> another person when the other person is compelled by force or imminent threat of force, and while armed with a deadly weapon (knife). *See* Exhs. Vol. I at 17; Ind. Code § 35-41-5-1; Ind. Code § 35-42-4-2(b)(1).
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> Count IV, Robbery, class A felony: A person who knowingly or intentionally takes property (car) from another by using force (striking with board), and which results in serious bodily injury. *See* App. at 222: Ind. Code § 35-42-5-1(1).
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> Count V, Attempted Murder, class A felony: A person who with the specific intent to kill[7] engages in a substantial step (repeatedly hitting Sanders on the head with board) toward the killing of another human being. *See* App. at 223; Ind. Code § 35-41-5-1; Ind. Code § 35-42-1-1(1).

Each of the above offenses has at least one element that the others do not. Rape is differentiated by the sexual intercourse, or penetration of the vagina, element. Confinement contains the removal aspect. Attempted criminal deviate conduct includes the attempted anal penetration element. The taking of property element is only present in the robbery charge. Specific intent to kill differentiates attempted murder from the other charges. In light of the fact that each charge contains at least one element that the others lack, *Blockburger* is satisfied. Thus, Taylor's counsel was not ineffective for failing to raise a federal double jeopardy issue.

At the time of Taylor's crime and subsequent trial, Indiana's constitutional prohibition against double jeopardy was "merged," or "in line with" the federal protection. *See Elmore v. State*, 269 Ind. 532, 534, 382 N.E.2d 893, 895 (1978). We "did not separately evaluate the Indiana Constitution as an additional, independent source of double jeopardy protection" until 1999. *See Richardson*, 717 N.E.2d at 49-50 & n.36 (recognizing that post-*Elmore*, pre-*Games* cases do not constitute precedent regarding the application of the Indiana Double Jeopardy Clause). Since no separate state constitutional double jeopardy issue was available,

we cannot say Taylor's counsel was deficient for not raising such an issue.

This is not the end of the inquiry, however. Taylor makes a common law double jeopardy argument as well. Our supreme court has "long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson*." *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002) (citing *Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring)). One of these rules is that double jeopardy is violated where "[c]onviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished." *Guyton v. State*, 771 N.E.2d 1141, 1142 (Ind. 2002) (quoting *Richardson*, 717 N.E.2d at 56 (Sullivan, J., concurring), in which Justice Sullivan cites *Kingery*, 659 N.E.2d at 496). In *Kingery*, our supreme court reduced a conviction for robbery as a class A felony to robbery as a class C felony because the enhancement for serious bodily injury was based on the same killing that supported the defendant's conviction for murder. 659 N.E.2d at 495-96. In other words, Kingery was "punished twice for the exact same act." *McElroy v. State*, 864 N.E.2d 392, 398 (Ind. Ct. App. 2007), *trans. denied*; *see also Moore v. State*, 652 N.E.2d 53, 60 (Ind. 1995) (reducing class A enhancement of robbery conviction because the very same killing that was the basis of the enhancement was also the basis of murder conviction).

Here, the robbery enhancement for serious bodily injury was based on the same behavior, striking Sanders with the wooden board, which supported Taylor's conviction for attempted murder. Thus, like defendants Kingery and Moore, Taylor was punished twice for

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[7] *See Zickefoose v. State*, 279 Ind. 618, 620, 388 N.E.2d 507, 508 (1979).

the exact same act. Under such circumstances, we are constrained to conclude that a common law double jeopardy violation is evident and should have been argued by defense counsel. Had this issue been raised, Taylor's robbery conviction would have been reduced from a class A to a class C felony, which has no element of bodily injury.[8] *See Strong v. State*, 2007 WL 2110472 *1, No. 20A03-0602-CR-69 (Ind. July 24, 2007) (citing *Richardson* and noting that to "remedy a double jeopardy violation, a court may reduce the sentencing classification on one of the offending convictions").[9]

In contrast, we do not see merit in Taylor's contention that attempted criminal deviate conduct is the same or a lesser-included offense of rape for double jeopardy purposes. Regardless of the criminal deviate conduct statute's ambiguity, there was no confusion regarding which actions were alleged to support the charges of rape versus attempted criminal deviate conduct in Taylor's case. By information, the State charged Taylor with rape for having sexual intercourse with Sanders and charged him with attempted criminal deviate conduct for attempting to penetrate Sanders' anus. The two acts were clearly different. *Cf. Firestone v. State*, 838 N.E.2d 468, 471-72 (Ind. Ct. App. 2005) (affirming convictions for rape and criminal deviate conduct where defendant raped victim then climbed on top of her and "shov[ed] his penis in her mouth;" noting that it "would be impossible for Firestone to have his penis inside S.W.'s vagina and in her mouth at the same time.") Similarly, it would be impossible for Taylor to be attempting anal intercourse if his penis was

[8] "A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear[.]" Ind. Code § 35-42-5-1.

inside Sanders' vagina. *See also Oeth v. State*, 775 N.E.2d 696, 703 (Ind. Ct. App. 2002) (concluding no double jeopardy violation where the "particular act of Oeth inserting his fingers in [victim's] vagina went beyond what was necessary to convict Oeth of attempted rape and is properly viewed as a separate criminal act"), *trans. denied*. Although distinguishing separate crimes often proves to be a difficult task, especially in cases of sexual assault, our supreme court has affirmed separation of acts, committed in a course of conduct, into distinct crimes. *See Collins v. State*, 717 N.E.2d 108, 110 (Ind. 1999) (quoting *Brown v. State*, 459 N.E.2d 376, 378 (Ind. 1984); "We do not approve any principle which exempts one from prosecution from all the crimes he commits because he sees fit to compound or multiply them. Such a principle would encourage the compounding and viciousness of the criminal acts."). Thus, defense counsel was not ineffective for failing to raise this issue.

We disagree with Taylor's assertion that the use of "armed with a deadly weapon," i.e., a knife, to elevate the counts of rape, criminal deviate conduct, and confinement, constituted double jeopardy. The "repeated use of a weapon to commit multiple separate crimes is not "the very same behavior" precluding its use to separately enhance the resulting convictions. *Miller v. State*, 790 N.E.2d 437, 439 (Ind. 2003). Rather, the use of a "single deadly weapon during the commission of separate offenses may enhance the level of each offense." *Gates v. State*, 759 N.E.2d 631, 633 n.2 (Ind. 2001). Accordingly, counsel was not deficient in failing to raise this argument.

Last, we are unmoved by Taylor's argument that at "no time during Taylor's single episode of violence did the confinement of [Sanders] extend beyond that necessary to

[9] The State neither addresses this common law argument nor mentions *Kingery* or that line of cases.

establish an element of the rape, attempted deviate conduct, attempted murder, and robbery convictions." Appellant's Br. at 21. The confinement charge alleged that Taylor removed Sanders by threat of force and while armed with a deadly weapon (the knife) from Interstate 64 into a barn approximately three miles north of St. Croix. The other crimes happened thereafter. Taylor could have done nothing to Sanders after forcing her off the road and into the secluded barn, yet still have been convicted of confinement. However, he chose to commit additional crimes, with additional elements, which can all be related without reference to the confinement. Taylor has not demonstrated that the confinement was coextensive with the other crimes, thus he has not shown double jeopardy. *See Merriweather v. State*, 778 N.E.2d 449, 456 (Ind. Ct. App. 2002) (concluding no double jeopardy violation where after robbery was completed, confinement occurred); *see also Salone v. State*, 652 N.E.2d 552, 561 (Ind. Ct. App. 1995) (no double jeopardy violation because confinement was not coextensive with the criminal deviate conduct, but instead went beyond that necessary to accomplish the criminal deviate conduct; after defendant confined and ordered victims to disrobe so he could search their clothes for missing crack cocaine, he forced them to perform sexual acts on each other, then ordered them to get dressed and strike one another, and finally locked them in basement, where they remained until defendant took one away and other three escaped). Again, failure to raise a meritless argument does not amount to ineffective assistance of counsel.

Conclusion

In summary, with one notable exception, Taylor has not met his burden of showing that the evidence as a whole leads unerringly and unmistakably to a decision opposite that

reached by the post-conviction court. Taylor has convinced us that double jeopardy bars his conviction and sentence for both attempted murder and class A felony robbery. Consequently, we remand with instructions to reduce his robbery conviction from a class A to a class C felony, and to resentence on that count.

Affirmed in part, vacated in part, and remanded with instructions.

BAKER, C. J., and FRIEDLANDER, J., concur.